THE ARGUMENT OF AN APPEAL*

By Hon. John W. Davis
of the New York City Bar

IF A LECTURE on the well worn subject assigned to me is to be given in this series, no one knows better than the Chairman of your Committee on Post-Admission Legal Education[1] that he and not I should be the person to give it. This is true in the first place because of the fact that in his lecture on Summary Judgment he has given the perfect example of what these lectures ought to be—informative, scholarly, helpful—and has set a standard which it is unfair to ask others to rival. And in the second place a discourse on the argument of an appeal would come with superior force from a judge who is in his judicial person the target and the trier of the argument than from a random archer like myself. Or, supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on flycasting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.

I hope I may not be charged with levity or disrespect in adopting this piscatorial figure. I do not suggest any analogies between our reverent masters on the Bench and the finny tribe. God forbid! Let such conceits tempt the less respectful. Yet it is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial favor to the advocate's claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?

I pause for definition. Argument, of course, may be written as well as oral, and under our modern American practice written argument has certainly become the most extended if not always the weightier of the two. As our colleague, Joseph H. Choate, Jr., recently remarked, "we have now reached the point where we file our arguments in writing and deliver our briefs orally." But it was not always so and in certain jurisdictions it is not so today. In England, for instance, where many, perhaps most cases are decided as soon as the argument is closed, counsel are not expected to speak with one strabismic eye upon the clock and the other on the court.

I recall that I once visited the chambers of the Privy Council in London hoping to hear a Canadian friend argue a Canadian appeal. When I arrived his adversary had the floor and was laboriously reading to the Court from the open volumes, page by page and line by line, the reported cases on which he relied. Said I to the Clerk, "How long has he been speaking and when will So-and-So come on?" "He has now been speaking," said the Clerk, "for six consecutive days and I doubt if he concludes today." I picked up my hat and sadly departed, realizing into what an alien atmosphere I had wandered.

In the old days, when not only courts but lawyers and litigants are reputed to have had more time at their disposal, similar feats were performed at the American Bar. It has been stated, for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Binney and others, for ten whole days assailed the listening ears of the Court.

Those days have gone forever; and partly because of the increased tempo of our times, partly because of the increase of work in our appellate tribunals, the argument of an appeal, whether by voice or pen, is hedged about today by strict limitations of time and an increasing effort to provoke an economy of space. The rules of nearly every court give notice that there is a limit to what the judicial ear or the judicial eye is prepared to absorb. Sometimes the judges plead, sometimes they deplore, sometimes they command. The bar is continuously besought to speak with an eye on the clock and to write with a cramped pen.

Observing this duty of condensation and selection I propose tonight to direct my remarks primarily to the oral argument. I begin after the briefs have all been filed; timely filed of course, for in this matter lawyers are never, hardly ever, belated. I shall assume that these briefs are models of brevity, are properly indexed, and march with orderly logic from point to point; not too little nor yet too much on any topic, even though in a painful last moment of proof-reading many an appealing paragraph has been offered as a reluctant sacrifice on the altar of condensation.

I assume also that the briefs are not overlarded with long quotations from the reported opinions, no matter how pat they seem; nor over-crowded with citations designed it would seem to certify to the industry of the brief-maker rather than to fortify the argument. A horrible example of this latter fault crossed my desk within the month in a brief which, in addition to many statutes and text writers, cited by volume and page no less than 304 decided cases; a number calculated to discourage if not to disgust the most industrious judge.

I assume further that they are not defaced by *supras* or *infras* or by a multiplicity of footnotes which, save in the rare case where they are needed to elucidate the text, do nothing but distract the attention of the reader and interrupt the flow of reasoning. And I remark in passing that these are no more laudable in a judge's opinion than they are in a lawyer's brief.

I assume that there is not a pestilent "and/or" to be found in the brief from cover to cover; or if there is, that the court, jealous of our mother-tongue, will stamp upon the base intruder.

And finally I assume as of course that there has been no cheap effort to use variety in type to supply the emphasis that well constructed sentences should furnish for themselves. It may be taken as axiomatic that even judges, when they are so disposed, can read under-

*Address delivered before the Association of the Bar of the City of New York, October 22, 1940.

1. Hon. Bernard L. Shientag, Justice, Supreme Court, New York City.

standingly; and I should think that where the pages of a brief begin conversationally in small pica, nudge the reader's elbow with repeated italics, rise to a higher pitch with whole paragraphs of the text—not mere headings—in black letter, and finally shout in full capitals (and such have been observed), the judge might well consider that what was a well intentioned effort to attract his attention was in reality a reflection on his intelligence.

So it is with our briefs brought to this state of approximate perfection that we approach our oral argument. Much has been said pro and con as to the utility of this particular exercise. The appellate court which I most frequently encountered in my early days at the bar made no secret of the fact that it regarded the time spent in hearing cases as a sheer waste; and the announcement "Submitted on briefs" always won an approving nod from the bench. Fortunately, I think, that was an idiosyncrasy which has passed away even in that tribunal. There is much testimony, ancient and modern, for the contrary view.

Says Lord Coke, "No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision: nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right." Agreeing as we must with this pious sentiment, we lawyers sometimes think nevertheless that "God moves in a mysterious way, his wonders to perform." Judge Dillon in his lecture on the Laws and Jurisprudence of England and America, declares that as a judge he felt reasonably assured of his judgment where he had heard counsel, and a very diminished faith where the cause had not been orally argued, for says he, "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the bar." Chief Justice Hughes is on record to the effect that "The desirability of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of the time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff." With all this most judges, I think, will agree, always provided that the oral argument is inspired as it should be with a single and sincere desire to be helpful to the Court.

Professing no special fitness for the task, I have ventured accordingly to frame a decalogue by which such arguments should be governed. There is no mystical significance in the number ten, although it has respectable precedent; and those who think the number short and who wish to add to the roll when I have finished, have my full permission to do so.

At the head of the list I place, where it belongs, the cardinal rule of all, namely:

(1) Change places (in your imagination of course) with the Court.

Courts of appeal are not filled by Demigods. Some members are learned, some less so. Some are keen and perspicacious, some have more plodding minds. In short, they are men and lawyers much like the rest of us. That they are honest, impartial, ready and eager to reach a correct conclusion must always be taken for granted. You may rightfully expect and you do expect nothing but fair treatment at their hands.

Yet those who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in their appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the "implements of decision." These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unravelled? What would make easier your approach to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the Court.

If you happen to know the mental habits of any particular judge, so much the better. To adapt yourself to his methods of reasoning is not artful, it is simply elementary psychology; as is also the maxim not to tire or irritate the mind you are seeking to persuade. And may I say in passing that there is no surer way to irritate the mind of any listener than to speak in so low a voice or with such indistinct articulation or in so monotonous a tone as to make the mere effort at hearing an unnecessary burden.

I proceed to Rule No. 2—

(2) State first the nature of the case and briefly its prior history.

Every Appellate Court has passing before it a long procession of cases that come from manifold and diverse fields of the law and human experience. Why not tell the Court at the outset to which of these fields its attention is about to be called? If the case involves the construction of a will, the settlement of a partnership, a constitutional question or whatever it may be, the judge is able as soon as the general topic is mentioned to call to his aid, consciously or unconsciously, his general knowledge and experience with that particular subject. It brings what is to follow into immediate focus. And then for the greater ease of the court in listening it is well to give at once the history of the case in so far as it bears on the court's jurisdiction. And sometimes there may be, I am not sure, a certain curiosity to know just whose judicial work it is that the court is called upon to review. For judges, like humbler men, judge each other as well as the law.

Next in order—

(3) State the facts.

If I were disposed to violate the rule I have previously announced against emphasis by typography, I would certainly employ at this point the largest capital type. For it cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued. Yet how many advocates fail to realize that the ignorance of the court concerning the facts in the case is complete, even where its knowledge of the law may adequately satisfy the proverbial presumption. The court wants above all things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most, cases when the facts are clear there is no great trouble about the law. *Ex facto oritur jus*, and no court ever forgets it.

No more courteous judge ever sat on any bench than the late Chief Justice White, but I shall never forget

a remark which he addressed to a distinguished lawyer, now dead, who was presenting an appeal from an order of the Interstate Commerce Commission. He had plunged headlong into a discussion of the powers of the Commission, and after he had talked for some twenty-five minutes, the Chief Justice leaned over and said in his blandest tone, "Now, Mr. So-and-So, won't you please tell us what this case is about. We could follow you so much better."

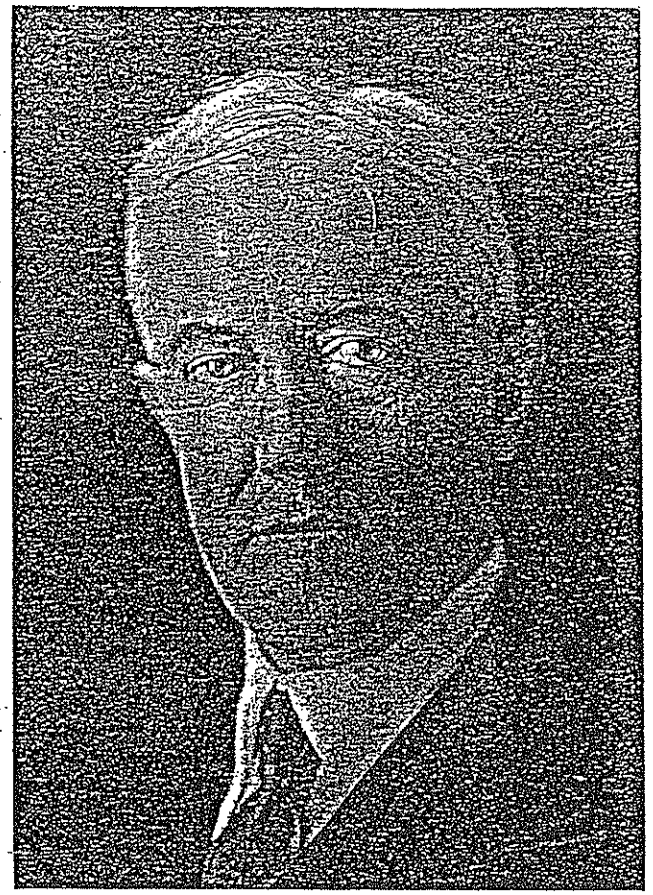
Of course there are statements and statements. No two men probably would adopt an identical method of approach. Uniformity is impossible, probably undesirable. Safe guides, however, are to be found in the three C's—chronology, candor and clarity: Chronology, because that is the natural way of telling any story, stringing the events on the chain of time just as all human life itself proceeds; candor, the telling of the worst as well as the best, since the court has the right to expect it, and since any lack of candor, real or apparent, will wholly destroy the most careful argument; and clarity, because that is the supreme virtue in any effort to communicate thought from man to man. It admits of no substitute. There is a sentence of Daniel Webster's which should be written on the walls of every law school, court room and law office: "The power of clear statement" said he, "is the great power at the bar." Purple passages can never supply its absence. And of course I must add that no statement of the facts can be considered as complete unless it has been so framed and delivered as to show forth the essential merit, in justice and in right of your client's cause.

(4) State next the applicable rules of law on which you rely.

If the statement of facts has been properly done the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view. It may be that in these days of what is apparently waning health on the part of our old friend *Stare Decisis,* one can rely less than heretofore upon the assertion that the case at bar is governed by such-and-such a case, volume and page. Even the shadow of a long succession of governing cases may not be adequate shelter. In any event the advocate must be prepared to meet any challenge to the doctrine of the cases on which he relies and to support it by original reasoning. Barren citation is a broken reed. What virtue it retains can be left for the brief.

(5) Always "go for the jugular vein."

I do not know from what source I quote that phrase but it is of course familiar. Rufus Choate's expression was "the hub of the case." More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun, or even as dead moons around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial. The temptation is always present to "let no guilty point escape" in the hope that if one hook breaks another may hold. Yielding to this temptation is pardonable perhaps in a brief, of which the court may read as much or as little as it chooses. There minor points can be inserted to form "a moat defensive to a wall." But there is no time and rarely any occasion in oral argument for such diversions.



Underwood & Underwood

JOHN W. DAVIS

I think in this connection of one of the greatest lawyers, and probably the greatest case winner of our day, the late John G. Johnson of Philadelphia. He was a man of commanding physical presence and of an intellect equally robust. Before appellate courts he addressed himself customarily to but a single point, often speaking for not more than twenty minutes but with compelling force. When he had concluded it was difficult for his adversary to persuade the court that there was anything else worthy to be considered. This is the quintessence of the advocate's art.

(6) Rejoice when the Court asks questions.

And again I say unto you, rejoice! If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises. This you should be able to do if you know your case and have a sound position. If the question warrants a negative answer, do not fence with it but respond with a bold *thwertutnay*—which for the benefit of the illiterate I may explain as a term used in ancient pleading to signify a downright No. While if the answer is in the affirmative or calls for a concession the Court will be equally gratified to have the matter promptly disposed of. If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument. Nothing I should think would be more irritating to an inquiring court than to have refuge taken in the familiar evasion "I am coming to that" and then to have

the argument end with the promise unfulfilled. If you are really coming to it indicate what your answer will be when it is reached and never, never sit down until it is made.

Do not get into your head the idea that there is a deliberate design on the part of any judge to embarrass counsel by questions. His mind is seeking help, that is all, although it may well be that he calls for help before he really needs it. You remember Bacon's admonition on the subject in his Essay on Judicature:

> "It is no grace to a judge" he says, "first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent."

On the other hand, Chief Justice Denison of the Supreme Court of Colorado puts the matter thus:

> "A perfect argument would need no interruption and a perfect Judge would never interrupt it; but we are not perfect. If the argument . . . discusses the truth of the first chapter of Genesis when the controlling issue is the constitutionality of a Tennessee statute it ought to be interrupted. . . It is the function of the Court to decide the case and to decide it properly. . . The Judge knows where his doubts lie, at which point he wishes to be enlightened; it is he whose mind at last must be made up, no one can do it for him, and he must take his own course of thought to accomplish it. Then he must sometimes interrupt."

Judges are sometimes more annoyed by each others' questions than counsel, I have observed. I remember a former Justice of the Supreme Court much given to interrogation, who engaged counsel in a long colloquy of question and answer at the very threshold of his argument. In a stage whisper audible within the bar Chief Justice White was heard to moan "I want to hear the argument." "So do I, damn him," growled his neighbor, Justice Holmes. Yet questions fairly put and frankly answered give to oral argument a vitality and spice that nothing else will supply.

(7) Read sparingly and only from necessity.

The eye is the window of the mind, and the speaker does not live who can long hold the attention of any audience without looking it in the face. There is something about a sheet of paper interposed between speaker and listener that walls off the mind of the latter as if it were boiler-plate. It obstructs the passage of thought as the lead plate bars the X-rays. I realize that I am taking just this risk at present, but this is not a speech or an argument, only, God save the mark, a lecture.

Of course where the case turns upon the language of a statute or the terms of a written instrument it is necessary that it should be read, always, if possible, with a copy in the hands of the court so that the eye of the court may supplement its ear. But the reading of lengthy extracts from the briefs or from reported cases or long excerpts from the testimony can only be described as a sheer waste of time. With this every appellate court of my acquaintance agrees. A sentence here or a sentence there, perhaps, if sufficiently pertinent and pithy, but not I beg of you print by the paragraph or page.

There is a cognate fault of which most of us from time to time are guilty. This arises when we are seeking to cite or distinguish other cases bearing on our claims and are tempted into a tedious recital of the facts in the cited case, not uncommonly prefaced by the somewhat awkward phrase "That was a case where," etc. Now the human mind is a pawky thing and must be held to its work and it is little wonder after three or four or half a dozen such recitals that not only are the recited facts forgotten but those in the case at bar become blurred and confused. What the advocate needs most of all is that his facts and his alone should stand out stark, simple, unique, clear.

(8) Avoid personalities.

This is a hard saying, especially when one's feelings are ruffled by a lower court or by opposing counsel, but none the less it is worthy of all acceptation, both in oral argument and in brief. I am not speaking merely of the laws of courtesy that must always govern an honorable profession, but rather of the sheer inutility of personalities as a method of argument in a judicial forum. Nor am I excluding proper comment on things that deserve reprobation. I am thinking psychologically again. It is all a question of keeping the mind of the court on the issues in hand without distraction from without.

One who criticizes unfairly or harshly the action of a lower court runs the risk of offending the quite understandable *esprit du corps* of the judicial body. Rhetorical denunciation of opposing litigants or witnesses may arouse a measure of sympathy for the persons so denounced. While controversies between counsel impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate, they can never persuade.

(9) Know your record from cover to cover.

This commandment might properly have headed the list for it is the *sine qua non* of all effective argument. You have now reached a point in the litigation where you can no longer hope to supply the want of preparation by lucky accidents or mental agility. You will encounter no more unexpected surprises. You have your last chance to win for your client. It is clear therefore that the field tactics of the trial table will no longer serve and the time has come for major strategy based upon an accurate knowledge of all that has occurred. At any moment you may be called on to correct some misstatement of your adversary and at any moment you may confront a question from the Court which, if you are able to answer by an apt reference to the record or with a firm reliance on a well-furnished memory, will increase the confidence with which the Court will listen to what else you may have to say. Many an argument otherwise admirable has been destroyed because of counsel's inability to make just such a response.

(10) Sit down.

This is the tenth and last commandment. In preparing for argument you will no doubt have made an outline carefully measured by the time at your command. The notes of it which you should have jotted down lie before you on the reading desk. When you have run through this outline and are satisfied that the court has fully grasped your contentions, what else is there left for you to do? You must be vain indeed to hope that by further speaking you can dragoon the Court into a prompt decision in your favor. The mere fact that you have an allotted time of one hour more or less does not constitute a contract with the Court to listen for that length of time. On the contrary, when you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench and a sigh of relief and gratification arises from your brethren at the bar who have been impatiently waiting for the moment when the angel might again trouble the waters of the healing pool and

permit them to step in. Earn these exhibitions of gratitude therefore whenever you decently can, and leave the rest to Zeus and his colleagues, that is to say, to the judges on high Olympus.

Before I obey this admonition myself, may I say, Mr. Chairman, how painfully conscious I am that I have offered nothing new concerning the subject in hand. I have not even been able to cover old thoughts with new varnish. How could I have hoped to do so? The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on the essentials of an appeal are always the same, and there is nothing very new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at their best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice or infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which all ordered society rests. There is no field of nobler usefulness for the lawyer. For him, who in the splendid words of Chancellor D'Aguesseau, belongs to an order "as old as the magistracy, as noble as virtue, as necessary as justice."

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Remembering John W. Davis: The Oral Argument of an Appeal

By
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Updated Biography -- 2011

Michael King is a principal of Carney Badley Spellman, in Seattle, Washington. For over 20 years his practice has focused exclusively on appellate litigation. Mr. King has argued over 100 cases to full merits panels, and has represented clients before the Alaska, California, Illinois, Mississippi, Tennessee and Washington Supreme Courts, the Second, Ninth and Eleventh Circuits, all divisions of the Washington Court of Appeals, and the United States Supreme Court. Mr. King is a Fellow of the American Academy of Appellate Lawyers, and a founding member and past president of the Washington Appellate Lawyers Association. He is a past member of the Steering Committee of the ABA's Council of Appellate Lawyers, and a past chair of the Chicago-based Defense Research Institute's Appellate Advocacy Committee. He has chaired and spoken at appellate law conferences around the country, and has written and co-authored numerous papers on a wide variety of appellate practice subjects.

Remembering John W. Davis:
The Oral Argument of an Appeal

By Michael B. King

Volunteering for an article about oral arguments on appeal, I asked myself, "What could you bring to this topic that would be truly fresh and original?" Promptly answering that question, "Nothing whatsoever," I considered abandoning the enterprise for another subject, except for two things. First, I really like oral arguments—they are my favorite part of the appellate "business," and if I couldn't come up with something useful to say on the subject, well. . .

Second, I was reminded that perhaps the greatest appellate advocate of the twentieth century, John W. Davis—member, Davis, Polk & Wardwell, Solicitor General of the United States, Ambassador to the Court of St. James under President Wilson, Democratic Party nominee for President in 1924—found himself in a similar predicament some 60 years ago, when preparing an address on the very same subject to be given to the Association of the Bar of the City of New York. (Davis' address is printed in volume 26 of the American Bar Association Journal (1940), at pages 895 through 899; it will be cited here simply as "Davis.") Initially describing the topic of oral argument as "well worn," Davis concluded his "decalogue" with this comment:

> I am . . . painfully conscious . . . that I have offered nothing new concerning the subject in hand. I have not even been able to cover old thoughts with new varnish. How could I have hoped to do so? The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on the essentials of an appeal are always the same, and there is nothing very new to be said about it.

Davis, at 895, 899.

Well, if John W. Davis thought he could offer "nothing very new" on the subject of oral argument, I concluded that I should be relieved of any guilt feelings on that score. Moreover, as I contemplated yet again the structure of the Davis decalogue (which I confess to reading at the start of every oral argument prep effort—a sort of appellate advocate's "pre-shot routine"), it occurred to me that if I could not offer something new, I could cover old thoughts in new varnish—to wit, the thoughts of John W. Davis, by employing the structure of his decalogue and updating it, in light of my own experience as an advocate, as well as experiences shared with me by my colleagues and friends in the developing (if still *de facto*) national appellate bar.

But first, let me try to answer an obvious threshold question: Why should any "modern" appellate advocate care about what John W. Davis had to say 60 years ago about the argument of an appeal. To begin, Davis must be acknowledged as one of the greatest American appellate advocates. Consider just two facts about his record: (1) at the age of 79, he argued and won the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); (2) at the age

of 80, he twice argued, and ultimately lost (to Thurgood Marshall) in *Brown v. Board of Education*, 347 U.S. 483 (1954). (Technically, Davis argued on behalf of the State of South Carolina in the companion case of *Briggs v. South Carolina*, which was consolidated to be heard with *Brown*.) There is no dispute that Marshall and his colleagues considered Davis their true, and a formidable, foe. And lest anyone question the propriety of holding up Davis as an exemplar for appellate lawyers, given his willingness to argue for South Carolina's constitutional right to maintain segregated schools, I note that Thurgood Marshall himself idolized Davis as the consummate appellate advocate. See, *e.g.*, Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* at 503 (1973).

An appellate lawyer who could sustain his powers at such a level so late in his life deserves our attention, when he outlines to fellow members of the bar what he has found to be the keys to effective advocacy. Moreover, the fundamentals of appellate advocacy have not changed so much since Davis gave his 1940 address that we cannot hope to gain from reconsidering Davis's ten rules for effective oral argument. Davis did remark on one major change from the earliest days of American appellate advocacy—the rise of written argument (briefs), which Davis acknowledged "ha[d] certainly become the most extended if not always the weightier of the two." Davis, at 895. Whether oral argument has since been totally eclipsed by the briefs is a point that will be touched on at the conclusion of this article.

In his 1940 address, John W. Davis set forth ten rules of appellate oral argument. Examination of these rules, and their applicability to the modern day, will take the balance of the article. We begin with what Davis declared "the cardinal rule of all":

1. Change Places (in your imagination, of course) with the Court.

A senior lawyer in my firm, who put me onto Davis in one of many acts of mentorship, preferred to call this first point, "understanding the court's 'point of view.'" Davis described what he meant by changing places with the court as follows:

> If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution?

Davis, at 896. He did not point to any specific factors peculiar to the nature of an appellate court that might affect what it is that they would want first to know about the case. Here is the first point where I shall presume to annotate Davis, by identifying several factors that I believe are peculiar to appellate judges, and which will affect how they would want the story told. Although appellate courts undoubtedly share with trial courts the same desire to do justice, appellate courts just aren't the same as trial courts, and the differences affect the way in which appellate judges approach a case.

Trial courts operate one judge at a time; appellate courts operate collegially. Trial judges deal with a stream of issues, whose individual resolution often requires making a fast and intuitive call; appellate courts expect they should have to deal, case by case, with only a handful of issues, to which they can address the time for the kind of reflection demanded of a precedent-

setting body. Appellate courts tend to attract judges, who are—how to say this?—"pickier" than trial judges, and appellate courts therefore tend to hold the lawyers who appear before them to a stricter standard of precision when it comes to characterizing both the law and the facts (*i.e.*, the record) of a case. This tendency is reinforced by the collegial nature of the institution, including the fact that the panel of judges will be backed up by a "panel" of clerks, bright young law graduates who play a far more important role in framing the judges' point of view than was the case of most appellate courts in Davis's day. Finally, although trial judges, at least as to the ultimate merits, generally bring no particular bias to bear, appellate courts bring a very definite bias to bear—against reversing the decisions of their trial colleagues.

All these institutional qualities, shared by every appellate court in my knowledge, affect the manner in which these judges approach an oral argument. Every appellate lawyer should approach preparation for argument with an awareness of how these qualities can shape how the judges approach their study of the case.

This brings me to another point not mentioned by Davis, but which fits very much in a discussion of the importance of understanding the court's point of view: the need for an advocate to recognize that, when he or she sits down to begin preparing for oral argument, this will be the first time that the lawyer will ever have studied the case in the same form as the court studies the case. Charles Wiggins, a former Washington State intermediate appellate court judge and a leading appellate advocate in the Pacific Northwest, has described this phenomenon in several talks on oral argument by distinguishing between the process of appellate advocacy and the end result of that process. As Wiggins puts it, advocates during the course of a case are engaged in an interactive process, by which both sides in a series of moves and countermoves create the record (much of which does not exist until the appellate lawyers call it into being, *e.g.*, by ordering the transcript) and then the briefing that embodies both sides' written arguments concerning the issues to be addressed by the reviewing court. But for precisely that reason, the lawyers can't know what they have created for the court's study until they complete the process, which in most cases comes with the filing of the appellant's reply brief.

Accordingly, the first chance for the advocates to see what they have created generally comes when the notice of argument-setting arrives in the mail. One therefore would expect an attorney to approach his or her preparation recognizing that he or she, like the panel before which the case will be argued, will be studying the case as a whole for the first time.

Here should be the best chance to follow Davis' advice—to change places with the court, and try to study the case with attention to what is likely to catch the court's eye. Yet all too few lawyers seem to grasp the need to approach their preparation with this cardinal principle in mind, and instead treat oral argument as little more than the chance to regurgitate orally an outline of the points already made in their briefing.

Many appellate lawyers seem to be misled by the short time allowed for argument. Confronted with a notice announcing one will have "only" ten or twenty or thirty minutes, many draw the (utterly erroneous) inference that they need dedicate far less than they would for a one or two hour summary judgment or closing argument before a trial bench. In fact, given the kind of precision expected by appellate judges, appellate advocates actually need to commit *more* time, precisely because they don't have the luxury of the kind of verbal vagaries that one can

safely risk in some grand trial court showpiece. And once having made the decision to limit preparation to "the afternoon before," the lawyer doesn't have time to do much more than craft an outline of the points already set forth in the briefs. As a result, the advocate has missed his or her best—indeed, *only*—chance to see how the court may see the case, and this loss can only weaken the effectiveness of his or her oral presentation. And the resulting adverse impact on the quality of the argument probably goes a long way towards explaining why oral arguments reportedly change the outcome in so small a percentage of cases.

2. State First the Nature of the Case and Briefly its Prior History.

Davis' decalogue suggests that "cold benches" (those judges who had given a case virtually no study before oral argument) were fairly common in his day, and this rule #2 appears to derive in part from this experience. But while the classic cold bench (*i.e.*, one on which no judge has even skimmed the briefs) may have become a thing of the past, Davis's advice still retains this contemporary resonance: Quickly tell the court from where the case originates, and what it concerns. In other words—get to the point! Tell the court who you are, and who you represent. If you represent the appellant, then state (in Davis's words) "the nature of the case and briefly its prior history," and then move directly to identifying the specific issues you intend to address. If you represent the appellee (respondent), as these matters will almost certainly have been touched upon by the appellant, proceed immediately to the issues after identifying yourself and for whom you speak.

3. State the Facts.

Here is the only point on which I must part company with Davis. He almost certainly expressed the need for a fairly full statement of the facts because of the substantial likelihood of a "cold bench" whose members would require a detailed explanation of the case at hand. But while contemporary appellate courts are presumed to be far more ready for counsel to plunge straight into "the issues," this does not mean that the facts no longer matter. *Ex facto jus oritor* (the law arises out of the fact) remains the controlling dynamic of an appellate case just as it was in Davis's day. Counsel must be prepared to demonstrate to the court how the facts compel a particular outcome, based on the rule of law made applicable by those facts.

But counsel must also remember—point of view, again—that the appellate court is not engaged in a *de novo* review of factual issues, save in the rare circumstance where the trier of fact has utterly missed the boat, and by so wide a mark that no reviewing court should be willing to throw out the lifeline of deference to the fact finder, and haul in the appellee to the safety of an affirmation. In the far more typical appeal, counsel must concern himself or herself with demonstrating that the facts of the case, as established by the trial court (or the jury, ratified by the trial court) are consistent with the application of established rules of law, or demonstrate the need to extend or modify (or even overturn) those rules of law. Many counsel fail to grasp this principle, and their failure is the chief cause of what appellate judges throughout the country refer to disparagingly as the "jury argument" approach to appellate argument.

4. State Next the Applicable Rules of Law on Which You Rely.

To restate Davis' point in more contemporary terms, demonstrate how the governing rules of law (or what you contend should be the governing rules of law) compel an outcome in favor of your client. As previously discussed, this requires tying the facts of your case tightly enough to a governing rule of law, with sufficient strength that the knots can resist the best efforts of opposing counsel to work them loose.

5. Always "Go for the Jugular Vein."

Now here is a rule that can never go out of style. Davis put it this way:

> More often than not there is in every case a cardinal point around which lesser points resolve like planets around the sun, or even a dead moon around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial.

Davis, at 897. Yet, so many appellate lawyers do exactly the opposite. Yielding to the temptation to "let no guilty point escape," these attorneys try to cover four or five or six issues, instead of picking their best one or two points and leaving the rest for the briefs. Fear of picking the "wrong" issue seems to cause many lawyers to try and cover the map. But as Davis points out, it is "the quintessence of the advocate's art" to be able, by the time of argument, to make the hard choices—to identify those issues that have passed through the briefing fires with the best chance of achieving the outcome sought for the client. Of course, the chances of identifying these issues is enhanced if counsel recognizes the need to commit sufficient time to preparing for the argument. For nothing increases the likelihood of an argument marred by an attempt to "cover all the bases" than waiting until the afternoon of the day before the hearing to begin one's preparations.

6. Rejoice When the Court Asks Questions.

And don't merely rejoice—anticipate those questions, and then when the court asks them, answer them directly and specifically. Study the case with an eye towards the questions it may raise in the mind of the court, and then prepare your answers so that they are the most persuasive. Be ready to answer the question with a response that promptly communicates the essence of the answer: "Yes, and . . ."; "No, but . . ."

Above all, abjure the temptation to "professorize"—to think one has the time to build an answer from the ground up, without telling the court what that structure will look like when it is finished. Appellate courts perceive that their time is limited and precious—and they are right! Launching off into what threatens, from the judge's point of view, to be a long, involved ramble of an answer that may never "get to the point" is only to invite interruption, and disruption, and to no good purpose.

Questions are the only way the appellate court has to direct counsel to the area of the case that gives the bench pause. The lawyer therefore should bend all his or her efforts to identifying likely areas of inquiry before argument. Then, during the argument, the lawyer should always give the court reason to believe that *this* attorney understands that his or her job is not to give a

speech but to engage in a dialogue that will help the court to resolve its concerns. Let me add that courts would be more likely to get the kind of direct answers they seek if the judges would abandon the "law school professor" approach to questioning, and instead just say—bluntly—"here is the problem for your side as I see it; give me your best argument as to why that really isn't a problem for your side."

7. Read Sparingly and Only from Necessity.

I will go further than Davis, at least as to the first crucial minutes of the argument: do not read *at all*. His point was fundamentally psychological: "There is something about a sheet of paper interposed between a speaker and a listener that walls off the mind of the latter as if it were boilerplate." Davis, at 898. For precisely that reason, the opening minutes are critical to establishing in the court's mind that you are different—that you understand that oral argument is not the time to read a prepared sermon, but to be ready to engage in a dialogue with the court. To do so, be ready to launch into the first minute or two of the argument ("May it please the court, my name is X. Along with Y and T, who are with me on the brief, I represent Smith. This case concerns. . . ."), making eye contact with every member of the court, and without *any* resort to prepared notes.

8. Avoid Personalities.

Amen! Don't attack the intelligence or integrity of opposing counsel, or the trial court. To be sure, if opposing counsel has misstated a material fact, don't hesitate to point that out. But do so *without adjectives*. If you can destroy the credibility of an adversary, by all means do so. But don't do so in a way that detracts from your own credibility.

9. Know Your Record from Cover to Cover.

"This commandment might properly have headed the list for it is the *sina qua non* of all effective argument." Davis, at 898. I have touched on this earlier, and will reiterate here—one must, given appellate courts, be prepared to demonstrate a *total* mastery of the *key* record. That means one must be ready to provide citations, down to the page and line of the testimony of a key witness or exhibit, especially when a question from the court demands such information. You cannot develop such an immediate, working mastery of the record unless you have dedicated the preparation time necessary first to identifying those portions of the record and then to mastering their precise content. Moreover, the overwhelming majority of appeals ultimately turn on the interpretation of just a handful of pages of the record—four, five, six, at most ten pages taken from what may total thousands of pages of testimony and documentary exhibits. The court will expect counsel to know these documents intimately, and a lawyer who is not ready to discuss that portion of the record at the level of pages, paragraph, and line simply has not done the work needed to prepare to make an effective argument on the client's behalf.

10. Sit Down.

In this day and age of ever more abbreviated oral arguments, you may rarely—especially as an appellant—ever have the chance to sit down before time has expired. But the point nonetheless remains as valid today as when Davis enunciated it, *i.e.*, that once you have made your essential points there is no good reason to continue. Of course, you should invite the court to ask

whatever questions it may still have. And you should, at the outset, have identified those issues you do not intend to cover, in order to send the court a signal that its members should "speak now or forever hold their peace" on such points. But if you come to a place in the argument where you truly sense closure, then let the court know this is your frame of mind, and without further ado—sit down.

A Concluding Observation

Many of us who regularly appear before appellate courts have heard judges repeatedly suggest that oral argument rarely changes the outcome. I believe that the poor quality of such oral argument contributes substantially to this perception. Until advocates are prepared to do more than spend an afternoon sketching an outline of points made in the briefing, to be repeated at the hearing scheduled for the following morning, oral argument will remain a squandered opportunity. I say "squandered opportunity" because I also believe that appellate courts, burdened by burgeoning caseloads, can no longer give the time required to master thoroughly all (or even most) of the cases presented to them for review, in the fashion their predecessors could 20 or 25 years ago. Under such circumstances, oral argument should play an ever more important role, because judges really do need the benefits of good oral argument to help them achieve the kind of precise focus required to assure that appellate justice is done. If advocates would only take the time to apply the lessons embodied in sources such as the Davis decalogue, they would not only do their clients a tremendous service—they would also fulfill their responsibility as appellate lawyers to (as Davis put it) "realize the maximum of justice in human relations."